Supreme Court of the United States

October Term 1933

No. 614

CHRIS LARSEN, PETITIONER

vs.

NORTHLAND TRANSPORTATION CO., A CORPORATION, CHARTERER OF THE AMERICAN MOTOR VESSEL "*NORCO*," RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief of Petitioner

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Reply Brief of Petitioner

PREFATORY STATEMENT

In this case a writ of *certiorari* was granted (54 Supreme Court Reporter, 373) to review the decision of the United States Circuit Court of Appeals for the 9th Circuit (66 F. (2d) 651, R. 53-60). The petitioner has not filed a new opening brief, and in view of the elaborate brief submitted by the respondent in

opposition to the petition for writ of *certiorari*, it is believed respondent will not submit any further brief on the merits. The purpose of the present brief is to make reply to respondent's brief in opposition.

STATEMENT OF THE CASE

A complete statement of the case will be found in the Petition for Writ of Certiorari. (Pp. 1-4). It is only necessary here to emphasize those facts which relate strictly to the principle of *res judicata*.

The petitioner's Complaint, in the State Court, alleged that the respondent "was the *owner of and operated* the United States Motorship 'Norco,'" and that it employed the petitioner aboard said vessel as an able seaman. (R. 19-20). The respondent by its Answer "denied each and every allegation therein (Complaint) contained," and nowhere alleged that it was merely the *charterer* and not the *owner* of the "Norco"; nor did respondent plead its right to a limitation of liability as a partial defense. (R. 23-24). After judgment was entered in the State Court, the respondent filed its petition for limitation of liability in the Federal District Court, alleging that it was not the *owner*, but merely the *charterer* of the "Norco," and that by reason thereof the value of its interest in the ship did not exceed $4,651,98, which included $3,856.00, "freight and passenger monies pending on said *voyage*." (R. 3-5).

ARGUMENT

I.

RESPONDENT'S AUTHORITIES

Apparently conceding that the State Court had jurisdiction and was competent to determine the value of the respondent's interest in the vessel and its pending freight, and to limit its liability accordingly, respondent nevertheless contends that it was not required to submit that issue to the State Court, but had a right to wait until its liability had been determined in the common law action, and then apply to the Federal Court for a limitation of that liability. Prior to *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, and *Ex Parte Green*, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212, this contention would have been plausible, and the decisions of inferior federal courts cited by the respondent under the caption "Limitation of Liability May Be Had After Trial on Merits" (Brief, 11-27) would undoubtedly have sustained the argument. But, whatever may have been the opinion of those courts, the question of the State Court's jurisdiction and competency has now been set at rest by the decisions of this Court in *Langnes v. Green*, and *Ex Parte Green, supra*. As was said by Circuit Judge Learned Hand in *In re Putnam*, 55 F. (2d) 73 (1932):

> "Langnes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, modified what had theretofore been supposed to be the effect of *White v. Island Transportation Co.*, 233 U. S. 346, 34 S. Ct. 589, 58 L. Ed. 993, by holding that, while a petition for limitation might be filed against a single claim and held in terrorem, ordinarily no injunction would go to prevent an action elsewhere."

Because those decisions clearly establish the jurisdiction of the State Courts to limit a shipowner's liability, it can no longer be contended that a shipowner may limit his liability in the Federal Court after judgment in the State Court.

A careful analysis of the cases (cited by respondent) decided by the lower federal courts prior to *Langnes v. Green* will show that in none of them was the question presented whether, upon the ship owner's failure to claim the benefit of the limited liability act in the State Court; the matter became *res judicata*. These cases, antedating the *Langnes* case, all assumed, where it was not expressly stated, that "state courts are impotent to administer the limited liability act" and that "state courts have not the requisite jurisdiction." Several of them involved more than one claim, or more than one owner, or both, under which circumstances the State Court, manifestly, was not competent, even under *Langnes v. Green*, to afford the shipowner appropriate relief.

The Benefactor, 103 U. S. 239, 26 L. Ed. 355 (1880), the only decision of this Court cited by respondent, was a collision case. The opinion states that two libels were filed, one for damage to the Schooner Susan Wright, and one by the crew, undoubtedly for personal injuries and property losses. Moreover, in that case, no action had been commenced in the State Court, and, therefore, the plaintiff's right to a trial by jury was not involved; and the doctrine of *res judicata* was not even mentioned.

In *The S. A. McCaulley*, 99 Fed. 302 (1899), some of the *several owners* of the ship petitioned in the Federal Court for a limitation of their liability, and the Court expressly stated:

> "The State Court does not possess the machinery to administer the Act of Congress, *even in cases where there is only one claimant.*" (Italics ours).

In re Old Dominion S. S. Co., 115 Fed. 845 (1902), involved *several claims.* The Court said that, if the petition for limitation of liability had been filed in the District Court before the trial in the State Court, *all of the issues would necessarily have been determined in the limitation proceeding*, and held:

> "The jurisdiction of this Court in such cases is ample and complete—it is absolute."

A careful study of *Gleason v. Duffy*, 116 Fed. 298 (1902), will disclose that the case involved many

claims and several owners. One of the claimants sued at common law in the State Court of Indiana. The owners, in their answer, had claimed the benefit of the Limited Liability Act, but the trial court had rejected the plea and this ruling had been affirmed by the Supreme Court of Indiana. In this situation, even under the *Langnes Case*, a shipowner had an absolute right to invoke the jurisdiction of the Federal Court. Furthermore, in the course of its opinion, the District Court observed that, if the petition had been filed before trial in the State Court, both the question of the shipowner's liability and limitation thereof could have been determined in the Federal Court.

In *The Ocean Spray*, 117 Fed. 971 (1902), no claim was made that the shipowner could have limited his liability in the State Court; the claimant excepted to the petition on the sole ground of *laches*. It was assumed, both by the Court and counsel, that the Federal Court had exclusive jurisdiction to administer the Limited Liability Act.

In re Starin, 124 Fed. 101 (1903), the Court held that the shipowner had not *waived* has right to limit his liability in the Federal Court by failing to claim that right in the State Court. No authority whatever is cited in support of that holding, nor is any

reason stated in support of the conclusion. The doctrine of *res judicata* is not mentioned. It is, therefore, only fair to say that the Court assumed, as the other courts had in the preceding cases, that the state courts are not competent to afford the shipowner a remedy under the Limitation Act. The "waiver" discussed plainly is one arising from *laches* in not sooner bringing the entire controversy to the Federal Court.

The City of Boston, 159 Fed. 257 (1906), was another collision case involving more than one claim. (See same case at 159 Fed. 261, where the facts are stated in subsequent proceedings.) Two of the claimants, husband and wife, had sued in the State Court and, after a verdict in their favor and the denial of a motion for a new trial, a petition for limitation of liability was filed. The District Court enjoined all further proceedings in the State Court and *took jurisdiction of the entire controversy,* and thereafter held that the shipowner was not liable for the damages claimed (159 Fed. 261.) *The Court held there was no waiver by reason of laches.* The doctrine of *res judicata* was not invoked, and the opinion, plainly, assumes that the State Court had no jurisdiction to afford a shipowner a remedy under the Limited Liability Act.

The Hoffmans, 171 Fed. 455 (1909), expressly holds that state courts are impotent to afford a shipowner adequate relief, even in cases involving single claims. The Court rejects the reasoning and procedure outlined in *The Lotta*, 150 Fed. 219, which has now been approved by this Court in the *Langnes Case*. That Court also points out the contrariety of judicial opinion which existed at that time, and elects to follow *In re Starin*, *The S. A. McCaulley*, and others cited by counsel, rather than *The Lotta*, *supra*.

In re P. Sanford Ross, 196 Fed. 921 (D. C. N. Y. 1912), a petition for limitation of liability was filed after plaintiff had obtained a *verdict* in the State Court. It was not claimed that the shipowner should have pleaded his right to a limitation of liability as a defense in the State Court, but simply contended *that the tort involved was not a maritime tort* and, therefore, the Admiralty Court had no jurisdiction. This was the only question decided.

Monongahela River Coal & Coke Co. v. Hurst, 200 Fed. 711 (C. C. A. 6, 1912), was another *collision case, involving several claims*, which had been commenced and tried in a court of admiralty. The petition for limitation of liability was filed in the same court after decrees adjudicating liability had been affirmed on appeals. The Court held that, although the shipowner had a right to claim the benefit of the

Limited Liability Act directly in the collision suits, he was not bound to do so, but could claim a limitation after liability had been adjudicated. Since the claimants (plaintiffs) were not deprived of the right to a trial by jury, or any other right, the owner's delay in invoking his right to a limitation of liability was not deemed to constitute *laches* barring a limitation of his liability.

In *The Defender*, 214 Fed. 316 (D. C. Wash. 1914), the petition for limitation of liability was filed in the District Court after liability in an action *in rem* had been established in the same forum. Again, plaintiff's right to trial by jury was not involved, and the Court merely held:

> "The exception, because of complaint's *laches*, is overruled."

The T. W. Wellington, 235 Fed. 728 (D. C. N. Y., 1916), is another case which assumes that the Federal Courts have exclusive jurisdiction to limit a shipowner's liability, even in cases involving single claims. The right of a shipowner to plead limited liability in the State Court is not discussed and, therefore, the doctrine of *res judicata* is not mentioned.

In *Strong v. Holmes*, 238 Fed. 554 (C. C. A. 9, 1916), the claimant contended that the shipowner had *no right to a limitation of liability* because only one claim was involved—*not that the issue was res*

judicata, because the shipowner had failed to plead it in the common-law action. The District Court dismissed the petition "for want of jurisdiction," and the Circuit Court of Appeals said:

> "It is suggested that the libel or petition was not filed in time; but we think otherwise. The Benefactor, 103 U. S. 239, 26 L. Ed. 351.
>
> "It is also urged that there is only one claimant * * * but the fact that there is but one claim is immaterial. White v. Island Transportation Co., 233 U. S. 346, 34 S. Ct. 589, 58 L. Ed. 993. * * *."

Manifestly, the Court assumed, on the authority of *White v. Island Transportation Co., supra*, that the Federal Court had exclusive jurisdiction to limit a shipowner's liability in *all cases*, and that is precisely what that Court subsequently held in *Green v. Langnes*, 35 F. (2d) 447, which this Court reversed.

Societe Napthes Transports v. Bisso Towboat Co., 241 Fed. 463 (C. C. A. 5, 1917), was a collision case nivolving a *libel* for damages to a vessel. The right to a jury trial in the State Court was not involved and, for this reason alone, the case is not in point.

In *The Ethelstan*, 246 Fed. 187 (D. C. Fla., 1917), a petition for limitation of liability was filed after a decree *in rem* had been entered in the same court. The Court held that the shipowner's failure to assert his right to a limitation of liability before the decree

was entered did not constitute a *waiver*. As above stated, with reference to other cases analyzed, this merely involved the application of the doctrine of *laches*, and not *res judicata*, or the right of a litigant to trial by jury in a common-law court.

In *The Victor*, 1 F. Supp. 931 (D. C. N. Y., 1927), it was not claimed that the shipowner should have pleaded his right to a limitation of liability in the State Court. This is another case where it was assumed that state courts are powerless to administer the Limited Liability Act.

The only case cited by the respondent decided since the *Langnes Case is, In re Moran Bros. Contracting Co.*, 1 F. Supp. 932 (D. C. N. Y., 1932). Except for the fact that the doctrine of *res judicata* was not invoked or discussed therein, the case apparently presents the identical question involved in this appeal. For this reason we wish to analyze this decision somewhat in detail. After briefly stating the facts, Judge Campbell there said:

> "No issue of the right of the petitioner to limit liability was tendered or decided in the state court, and the petitioner lost no rights thereby."

and disposed of the case in *four very brief paragraphs*, consisting *of exactly five sentences*. We quote these paragraphs and discuss them separately as presented:

"(1) While under Langnes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, the state court is competent to entertain a claim of the shipowner for a limitation of liability, and to afford him appropriate relief, the shipowner was not bound to seek that relief in the state court, but was free to invoke the jurisdiction of this court. In other words, where there is but a single claim on which *the claimant can choose his own forum to try the issue of liability, the shipowner can choose his own forum to try the issue of his right to limit that liability.*" (Italics ours).

This statement is not sound, for the following reasons:

1. It was not the intention of the Limited Liability Act to give a shipowner a *choice of forums.* In the *Aquitania* 20 F. (2d) 457, (C. C. A. 2), the Court said:

"The statute is intended to limit the liability of the shipowner, but not arbitrarily to give him a particular forum. * * *. All that could be accomplished by appellant (petitioner), if successful on this petition, would be to avoid jury trials. It would be permitting it to try the case in another forum of its choice and this is unauthorized by the Act."

See also: The *Tug No. 16*, 236 Fed. 405, 406.

In the *Langnes Case*, this Court quoted with approval the following from *The Lotta*:

"All that the petitioner can fairly claim is that he should not be subject to a personal judgment for an indefinite amount and beyond the value of his interest in The Lotta and her freight. There

> is no reason to doubt that this proper defense may be availed of in the state court, *and if there is any ulterior purpose, and petitioner's object in invoking the jurisdiction of this court is to escape a jury trial and take the case away from the common-law jurisdiction, that purpose should receive no countenance here; for the Act which gives this court its admiralty and maritime jurisdiction saves to suitors in all cases the right of the common-law remedy where the common law is competent to give it, and good faith requires that this proviso shall have its full and fair effect.*" (Italics ours).

In re Putnam, 55 F. (2d) 73 (C. C. A. 2, 1932), the shipowner filed a petition for limitation of liability in the District Court, before the administratrix of a deceased seaman commenced her action in the state court, attempting thereby to deprive her of a jury trial. She moved to vacate the injunction, alleging that no other claims could arise from the accident, which was admitted. "The District Court denied this motion on the ground that the limitation proceedings were an earlier exercise of jurisdiction which excluded that of any other court." In reversing the District Court and vacating the injunction, the Circuit Court, after referring to *Langnes v. Green*, said:

> "* * * The single claimant had there (Langnes v. Green) already commenced an action, and this is the only ground for distinguishing the case at bar. Both District Judges thought this difference critical, adopting the view that limita-

tion proceedings were *in rem*, and that the case was an instance of the familiar doctrine that the jurisdiction of the earlier court, in a suit involving custody over a *res*, is exclusive. The only question for us is whether this is correct.

"We think that it is not. * * * When there is but a single possible claim, a contrary result would only remove the case from the tribunal properly vested with jurisdiction; in short, avoid a jury trial. The statute intended nothing of the sort, and the effort is to be discountenanced.

"It follows * * * that the injunction should be vacated."

In the case at bar, instead of anticipating the claimant's action, the shipowner is attempting to avoid a jury trial on one of the vital issues, by waiting until after liability has been adjudicated in the State Court, and this effort should likewise be "discountenanced."

2. While Judge Campbell concedes that, under the *Langnes Case*, the claimant can "choose his own forum" to try *the issue of liability*, he says nothing concerning the claimant's right to choose his own forum to try the issue of the *value of the vessel and her freight pending*. This issue is just as important to the claimant as is the issue of *liability*, and this Court in the *Langnes Case* has very plainly held that the claimant is entitled to submit both of these issues to the jury. The Court quoted as follows from *The Lotta*:

"The owner of the vessel, therefore, can by answer in the State Court, set up as a defense that he is not liable beyond the value of the vessel, *and that value can be determined as appropriately and as easily in that court as in this.* In the ex parte proceedings here, the vessel has been appraised by appraisers chosen by the petitioner, and, while there may be no reason to question the fairness and fullness of such appraisement, *the plaintiff is entitled to be heard on that question, and, in the usual course of common-law proceeding, that issue can be fairly tried.* * * * and that the only questions to be decided there (state court) are, first, whether the defendant is liable at all, and, if so, *as to the value of the vessel* and her freight, which is the limit of the defendant's liability." (Italics ours).

The foregoing quotation from *The Lotta* is repeated in *Ex Parte Green*, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212. Judge Campbell apparently has overlooked this very important point.

The second paragraph of Judge Campbell's opinion is as follows:

"This Court has jurisdiction, and should entertain a petition to limit liability after a trial of the *issues of liability* and to restrain further proceedings in the common law court, or execution on the judgment or decree obtained. The Benefactor, 103 U. S. 239, 26 L. Ed. 351; The Victor (D. C.), 1 F. Supp. 931, 1927, A. M. C. 1121; In re Starin (D. C.), 124 F. 101; The T. W. Wellington (D. C.), 235 F. 728." (Italics ours).

It will be noted that the cases cited in support of this proposition (all of which we have analyzed above)

were all decided before the *Langnes Case*. Here, again, Judge Campbell speaks only of the *issue of liability*, and ignores the issue of the *value of the vessel and her freight pending*.

The third paragraph of his opinion holds:

> "No laches has been shown, as the shipowner was not required to claim limitation until a liability on its part was established."

The question is not one of *laches*, but plainly involves the doctrine of *res judicata*. Judge Campbell concedes that under the *Langnes Case*,

> "* * * the state court is competent to entertain a claim of the shipowner for limitation of liability, and to afford him appropriate relief, * * *"

If thit be true, application of the doctrine of *res judicata is inescapable*. The opinion, however, does not discuss it.

As stated by Judge Neterer in the opinion filed herein (R. 30), 1 F. Supp. 932, 933-934:

> "The state court being competent to give common-law remedy and having jurisdiction to determine the value of the charterer's interest in the vessel, he being the only claimant, and the claim could with propriety have been determined in that suit, it was his duty to plead limitation of liability, if any, to the value of his interest in the ship. An adequate remedy was available and not put forward, and escape from the judgment

which followed cannot be made (citing cases). The judgment upon the merits is res judicata, not only as to the issue presented, but also to rights and issues which might have been presented. (Citing cases).

"The petitioner was not at liberty to present his defense by piece-meal and litigate the liability in the state court. (Citing cases)."

Judge Campbell's statement that "The shipowner was not required to claim limitation until liability on its part was established," is squarely in conflict with the holdings of this Court in the *Langnes Case* and in *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927. In the latter case, the Court said:

"Petitioner asked an instruction that Section 4283 of the Revised Statutes (Comp. Stat. Sec. 8021, 6 Fed. Stat. Annot., 2nd Ed., p. 336) applied, and that, under it, the verdict could not exceed the value of the vessel. In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading. The Lotta, 150 Fed. 219, 222; Delaware River Ferry Co. v. Amos, 179 Fed. 756. *Here, the privilege was not set up or claimed in the answer, and it could not be first presented upon request for a charge to the jury.*" (Italics ours).

Although the foregoing quotation is quoted with approval by the court in the *Langnes Case*, Judge Campbell's opinion utterly ignores it.

The fourth and concluding paragraph of Judge Campbell's opinion is as follows:

> "The judgment in the state court, of course, establishes the amount of the claimant's damage, but does not determine the issue of the shipowner's right to limit, and no authority is cited, nor that I have found, which *required* the shipowner to litigate his *right to limitation of liability in the state court.*" (Italics ours).

Of course the plaintiff in the State Court must confess the shipowner's *right* to a limitation of liability. If he challenges that right, the action in the State Court will be enjoined and the entire controversy will be brought to the Federal Court, because that Court has exclusive jurisdiction to determine whether a shipowner is entitled to a limitation of his liability. *Ex Parte Green.* On the other hand, in a State Court, it is the duty of a shipowner to plead, as a partial defense, his right to a limited liability, alleging the value of the vessel, or his interest therein; and when he has done this the claimant is then called upon to admit the shipowner's *right* to a limitation, and the value of the vessel, if disputed, thus becomes a question of fact to be determined by the jury. This, plainly, is the holding of the Court in the *Carlisle Packing Co.* and *Langnes* cases, *supra.*

II.

RES JUDICATA

Since it is now settled that both the federal and state courts have jurisdiction, and are competent, to administer the Limited Liability Act in cases involving a single claim, there is no sound reason why the shipowner should be permitted to institute an independent proceeding in the federal courts for a limitation of liability, unless and until his right to limitation has been challenged in the State Court. Where, as in the case at bar, the shipowner or charterer could have asserted his right to a limited liability in the State Court, but failed to do so, the matter must be deemed *res judicata*. We believe the argument and authorities cited in Petitioner's Brief in support of the Writ (Pp. 29-36) amply sustain this proposition.

The respondent argues, however, (Brief, 37) that our position in this regard is based upon a false assumption. It is there said:

> "This assertion assumes a situation which is not here presented, namely, that if respondent had claimed a limitation of liability in the state court, the petitioner would have confessed the right to limitation, as otherwise the state court would have had no jurisdiction to determine respondent's right to limitation of liability."

If the respondent had claimed the right to a limited liability in the state court, the petitioner could not

have denied it, because it appeared on the face of his complaint (R. 20-21) that the negligence upon which the respondent's liability was predicated was that of a fellow servant (winchman), concerning which the respondent, manifestly, could have had no "privity or knowledge." In other words, the allegations of the petitioner's complaint amounted to a confession that the cause of his injury was *without the privity or knowledge of the respondent*, which entitled respondent to limitation of liability.

In this situation, if limitation had been claimed, any judgment entered against the respondent would necessarily have been limited to the value of its interest in the vessel as determined by the jury.

But apart from this, we believe the necessary result of the *Carlisle Packing Co.* and *Langnes* cases, *supra*, to be that the shipowner (before invoking the jurisdiction of the federal courts) is required to plead his right to a limited liability as a defense, and thus give the claimant an opportunity to confess the right.

The respondent's argument relating to the principle of *res judicata* is based entirely upon the assumption that the right to a limitation of liability "is not a defense to petitioner's claim." (Brief, 39). But this Court has definitely held that in a state court, where

there is only one possible claimant and one owner, the shipowner's right to a limitation of liability *is a defense*, which must be pleaded by way of answer to the plaintiff's complaint.

In *Carlisle Packing Co. v. Sandanger, supra*, the Court said:

> "In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading. The Lotta, 150 Fed. 219, 222; Delaware River Ferry Co. v. Amos, 179 Fed. 756. *Here, the privilege was not set up or claimed in the answer, and it could not be first presented upon request for a charge to the jury.*" (Italics ours).

Quoting from "*The Lotta*" the Court further said in the *Langnes Case*:

> "The owner of the vessel, therefore, can by *answer* in the state court set up as a *defense* that he is not liable beyond the value of the vessel, and that value may be determined as appropriately and as easily in that Court as in this.
>
> * * * "There is no reason to doubt that this *proper defense* may be availed of in the state court, and if there is an ulterior purpose, and petioner's object in invoking the jurisdiction of this Court is to escape a jury trial and take the case away from the common-law jurisdiction, that purpose should receive no countenance here; for the act which gives this Court its admiralty and maritime jurisdiction saves to suitors in all cases the right of the common-law remedy where the

common-law is competent to give it, and good faith requires that this proviso shall have its full and fair effect." (Italics ours.)

For these reasons it is not deemed necessary to analyze and distinguish the authorities cited by the respondent on this point.

III.

ISSUES ADJUDICATED BY THE JUDGMENT OF THE STATE COURT

As already stated, the petitioner in his complaint alleged that the respondent was the *owner* of the "Norco". (R. 19.) The respondent in its answer denied this allegation of *ownership*. (R. 23.) It thus appears from the pleadings in the state court that the *ownership* of the vessel was an issue in the case, and the state court having rendered judgment in petitioner's favor, that issue must be deemed *res judicata*; and the respondent cannot now be heard to say, as alleged in its petition for limitation of liability, that it was only the *charterer* of the vessel. This Court will not go behind the judgment of the state court to determine whether there was sufficient evidence to support the finding of the state court that the respondent was the owner. (This is elementary law and requires no citation of authority.) And, since it appears on

the face of the respondent's petition for limitation of liability that its interest in the vessel, as alleged *charterer*, amounted to $4651.98, all except $795.98 of which constituted "freight and passenger monies pending *on said voyage*," (R. 4-5), for obvious reasons, it must be assumed that the value of respondent's interest as the *owner*, exceeds the amount of petitioner's judgment by many thousands of dollars. Under these circumstances, a petition for limitation of liability cannot be sustained. *The Aquitania*, 20 F. (2d) 457, *supra*.

This being an admiralty proceeding which is tried *de novo*, the Court is not limited to a consideration of the grounds upon which either of the courts below rested their judgments, but will direct the proper judgment which should have been rendered on the record then before those courts. In *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. ed. 520, *supra*, the Court said with reference to this matter:

> "The question then arises: What is the scope of inquiry in this Court when the case is brought up by certiorari from the Circuit Court of Appeals? It has been decided that upon writ of error from an intermediate appellate tribunal we are not limited to a consideration of the points raised by the plaintiff, but 'must enter the judgment which should have been rendered by the Court below on the record then before it.' Baker v. Warner, 231 U. S. 588, 593, 34 S. Ct. 175, 177, 58 L. Ed. 384. And in Delk v. St. Louis & San

> Francisco R. R., 220 U. S. 580, 588, 31 S. Ct. 617, 55 L. Ed. 590, following Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 267, 30 S. Ct. 505, 54 L. Ed. 757, it was held that on certiorari, likewise, the entire record is before this Court with power to review the action of the Court of Appeals and direct such disposition of the case as that Court might have done upon the writ of error sued out for the review of the Circuit (now District) Court. In Watts, Watts & Co. v. Unione Austriaca, etc., 248 U. S. 9, 21, 39 S. Ct. 1, 2, 63 L. Ed. 100, 3 A. L. R. 323, it was said that: 'This Court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require'; and 'the rule is the more insistent, because in admiralty cases are tried de novo on appeal.' See, also, Dorchy v. Kansas, 264 U. S. 286, 289, 44 S. Ct. 323, 68 L. Ed. 686."

It is therefore submitted that, in any event, the judgment of the District Court dismissing the respondent's petition should be reinstated, not only on the grounds sustained by the district judge, but on the further ground that it has been adjudicated by the judgment of the state court that the respondent is the owner of the "Norco", and the value of the vessel appears to greatly exceed the amount of petitioner's judgment.

There is still another valid reason why the judgment of the Circuit Court of Appeals should be reversed and that of the District Court reinstated. In its petition for limitation of liability the respondent

alleges that it is the charterer and operator of the "Norco" and that it "*manned, victualed and navigated said vessel at its own expense.*" (R. 3.) Title 46 U. S. C. A., so far as material to the question now under consideration, provides as follows:

> . . Section 183. "The liability of the owner of any vessel for any * * * act, matter, or thing, loss, damage, * * * done, occasioned, or incurred without the privity or knowledge of such owner * * * shall in no case exceed the amount or value o fthe interest of such owner in such vessel, and her freight then pending."
>
> Section 186. "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel, within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; *and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.*"

(On page 7 of its brief the respondent quotes Section 186 but omits the last clause thereof which we have italicized and which is pertinent to the present inquiry). It will be noted that by the plain and unambiguous language of Section 186 a charterer of a vessel who mans, victuals and navigates it at his own expense is deemed the owner of the vessel within the meaning of the Limited Liability Act and he is liable in the same manner and to the same extent as though he were the owner of the vessel. The respondent's pe-

tition for limitation of liability alleges that it is such charterer as is describd in Section 186; and since it appears, inferentially, from other allegations of respondent's petition that the value of the vessel greatly exceeds the amount of petitioner's judgment, the petition for limitation must be dismissed. We have not been able to find any decision of this Court which passes directly on the question now under consideration nor any other decision which is squarely in point except that of Judge Kerrigan, District Judge of the Northern District of California, in the recent case of *Spencer v. Beadle S. S. Co.* (unreported so far as we know). We are advised by Spencer's Proctor, Mr. A. Don Duncan, Russ Building, San Francisco, California, that Judge Kerrigan, in that case, held: "the charterer is liable for the entire value of the vessel." A copy of Judge Kerrigan's memorandum opinion, as furnished us by Mr. Duncan, is as follows:

> "The governing statute is Sec. 186 of Title 46 U. S. C. A. which provides:
>
> " 'The charterer of any vessel, in case he shall man, vitual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of such vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.'
>
> "It would seem apparent from the last clause that the vessel or its value is the measure of the

charterer's liability. Were it not for this statute the charterer would be liable for the full amount of the judgment against him. The effect of the statute is to enable him to limit his liability provided he does as the owner is required to do under Sec. 183 of the same title. He must surrender the vessel or its value. It has been held that, under the provisions of this section, the charterer as the owner pro hac vice, and not the owner is the party responsible for the torts of the vessel. Thorp v. Hammond, 12 Wall. 408: 'The Barnstable', 181 U. S. 464; see 'The Elfrida', 14 Fed. (2nd) 237. Furthermore, the charterer's interest in the vessel is contractual and consists merely in the right to use it under the terms and conditions of the charter party. He has nothing commonly regarded as an interest in the ship. If then, petitioner's contention were adopted, one having a claim recoverable to the extent of the value of the vessel had it been operated by the owner, would be limited to the recovery of the nominal interest of the charterer and the freight, and at the same time would have no right of action against the owner. Such a construction is not warranted by the language of the statute and its adoption would practically nullify the right of recovery of any sizable claim falling within the limitation statutes where the vessel is chartered. It is my view that the charterer is the owner pro hac vice and must surrender the vessel and freight pending at the end of the voyage or its value."

In view of the plain terms of the statute and the decisions of this Court cited in the opinion, it is difficult to understand how Judge Kerrigan could have arrived at any other conclusion.

CONCLUSION

For all of the foregoing reasons we respectfully urge that the judgment of the Circuit Court of Appeals is erroneous and should be reversed and that the judgment of the District Court dismissing respondent's petition for limitation of liability should be reinstated.

Respectfully submitted,

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